9-1800-9650-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Rate Appeal of Sleepy Eye Care Center, Crystal Care Center, Maplewood Care Center, Edina Care Center and Volunteers of America, Inc.

DISCOVERY ORDER

The above-entitled matter is before Administrative Law Judge Phyllis A. Reha for a determination under Minn. Rule 1400.6700, subpart 2, as to whether certain employees of the Minnesota Department of Human Services may be deposed in regard to the basis for their classification of certain costs as nonallowable.

By a written Motion filed November 1, 1995, Sleepy Eye Care Center, Crystal Care Center, Maplewood Care Center, Edina Care Center and Volunteers of America, Inc. (Appellants) sought an Order compelling the Minnesota Department of Health to respond to deposition questions and produce documents concerning performance evaluations of and disciplinary measures taken against investigators of the Office of Health Facility Complaints who were involved in the investigations leading to this contested case proceeding. On November 13, 1995, the Department of Human Services (DHS or the Department) filed a memorandum in opposition to the Motion. The record on this Motion closed with the receipt of the Department's memorandum.

Thomas L. Skorczeski, of the firm of Orbovich & Gartner, Chartered, 710 North Central Life Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, filed the Motion on behalf of Appellants. Jacqueline M. Moen, Assistant Attorney General, Suite 900, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, represented the Department.

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the memorandum which follows, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

The Department shall make available those employees to be deposed pursuant to the Appellants' Notice of Deposition of Minnesota Department of Human Services, dated October 19, 1995. The date of the deposition shall be agreed upon between counsel for the Appellants and for the Department.

Dated: November _____, 1995.

_____
PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

The Appellants in this matter have filed a Motion to Compel as a result of the Department's refusal to participate in depositions of its employees. The purpose of the depositions is to inquire into what considerations went into disallowing central office costs. The Department has refused to agree to the depositions on the grounds that the deadline for discovery has passed and the request will not lead to relevant evidence. The Department has also argued that Appellants have not demonstrated that they are entitled to an order compelling discovery under Minn. Rule 1400.6700, subpart 2.

A prehearing conference was held in this matter on June 8, 1995, and a schedule for completing various prehearing actions was set. Discovery was to have been completed by September 8, 1995. The parties agreed to extend that deadline until October 6, 1995. On September 12, 1995, the Department served on Appellants its Answers to interrogatories. On September 18, 1995, Appellants deposed Cindy Bunting. On October 6, 1995, Appellants received the transcript of that deposition. On October 16, 1995, Appellants' counsel contacted Department's counsel and requested a stipulation to again extend the discovery deadline to permit the Appellants an opportunity to examine the Department regarding the cost reporting and rate setting requirements of Rule 50 and to examine the Department regarding the practices of desk auditors. Appellants served their Notice of Deposition of the Department on October 19, 1995, approximately two weeks after the deadline for completion of discovery. On October 25, 1995, the Department indicated that it would not agree to extend the discovery deadline and would not accede to the noticed deposition.

The Department asserts that a two week delay beyond the discovery deadline constitutes "unnecessary delay"; and thus, the Appellants' Motion to Compel Discovery should be denied. The Department further maintains that Appellants have had ample opportunity to discover the information they are now seeking; and, Appellants' pattern of delays justifies a denial of their Motion to Compel.

The Appellants responded that the Department's Answers to Interrogatories are circular and nonresponsive thereby creating the need for depositions to discover how the Department arrived at its decision to disallow the contested costs. Appellants' counsel state that a heavy volume of work and an error in calendaring the matter has also contributed to the delay in filing the Notice of Deposition.

Minn. Rule 1400.6700, subpart 2 does not define "unnecessary delay". The request for an extension of time came two weeks after the deadline for discovery. At that time, the parties had already extended the deadline once voluntarily, and no

hearings were scheduled. Neither party has suggested that some external deadline, such as a statutory deadline, applies to this matter. Granting the Appellants' discovery request does not cause significant prejudice to the Department; nor does it cause significant delay in these proceedings. The Department should resolve any of its difficulties in obtaining discovery from Appellants through its own motion to compel, not by resisting further discovery requests. . .

The Department asserts that the information sought by Appellants is irrelevant to the issues in this proceeding. Appellants maintain that the discovery is sought to determine "how Rule 50's central office costs requirements applied to the disputed cost reports, as well as to explain the actual practices of desk auditors in applying those requirements to Appellants' cost reports." Appellants' Memorandum in Support, at 3. The Department maintains that questioning desk auditors about why the Department has disallowed costs is "pointless." Department Memorandum in Opposition, at 6. In the Department's opinion, the propriety of the rate adjustments will be determined on the merits of the costs claimed and the application of the rule.

The Department's view of the issues in this matter is too narrow. While the Department is correct in its analysis that the costs claimed and the effect of the appropriate rule will determine the outcome, the Department's auditors have a significant role in determining the effect of the rules. The manner in which auditors have interpreted the rules has an impact on long-standing agency practices (or the absence of such practices). The manner in which auditors have treated Appellants, as opposed to other similarly situated providers, is also relevant to this matter. This is true even if the auditors have treated the Appellants the same as similarly situated providers. Relevance is not limited to evidence in favor of the party requesting discovery.

The Department maintains that the holding in the Matter of Crestview Manor, Inc., 365 N.W.2d 387, (Minn.App. 1985), precludes inquiry into audit procedures unless a provider can show prejudice. Department Memorandum in Opposition, at 6. The relevant portion of the opinion states:

> The nursing homes claim the Department is guilty of certain procedural irregularities which resulted in an unfair audit. First, they claim the Department failed to give a "detailed statement of the reason for any difference between the rate requested by the provider and the rate determined" as required by Minn. R. 9510.0050 (1983). This requirement enables a provider to understand the nature of the adjustment and what provisions of Rule 9510 were relied upon. The field auditor felt such notice was unnecessary in this case.
>
> The nursing homes have not shown that they were actually prejudiced by the Department's failure to give an explanation concerning the personnel director's salary adjustment. The auditors in this case have consistently included Robert Odell's salary as personnel director in the top-management limitation since fiscal year 1980.

> Second, the nursing homes argue the Department adopted a new position after the hearing before the administrative law judge. We disagree. The Department's position consistently has been that Robert Odell's total compensation must be allocated to the top-management limitation because he performs substantial executive duties as a president, board member or personnel director.

Crestview, 365 N.W.2d, at 391.

The holding in Crestview is that audit adjustments will not be foreclosed for procedural errors absent a showing of prejudice. There is nothing in Crestview to suggest that audit procedures cannot be questioned as part of a provider's case.

The Department also cites Surf and Sand Nursing Home v. Department of Human Services, 422 N.W.2d 513, (Minn.App. 1988), in support of its view that Department personnel cannot be deposed where the material issue to be decided was the effect of the rule on the provider. Department's Memorandum at 6-7. In Surf and Sand, the issue was limited as follows:

> Surf and Sand also raises a discovery issue. It had requested an opportunity to depose several people who had worked in the Department at the time *White Bear Lake* was decided, and the Department denied the request. Several days prior to the hearing, Surf and Sand, in a telephone conference that was not recorded, moved the administrative law judge to allow the depositions. The purpose of the depositions was to inquire whether the Department employees thought the gross dollar method announced in *White Bear Lake* was equitable and why the Department had not promulgated a rule authorizing the use of the per diem method after *White Bear Lake* was decided. The Department again objected to allowing the depositions. The administrative law judge denied the motion on the grounds that no material or relevant information could be obtained from such a deposition.

Surf and Sand, 422 N.W.2d at 516.

The denial of depositions in Surf and Sand arose from the limited issue present in the case; that is, whether the retroactive application of a cost method was somehow unfair. The Minnesota Supreme Court had already ruled that the other cost method argued in the case was improper. The matter before the ALJ in Surf and Sand was limited to whether the Minnesota Supreme Court decision was to be applied retroactively. There could be no relevant information obtained from the auditors when the issue was limited to retroactive application of a court decision. The issues in this matter are not so limited. Neither the decision in Crestview nor the decision in Surf and Sand limit the discovery appropriate in this matter.

The Department argues that the Appellants have not met their burden of demonstrating that an order compelling discovery should be granted. As discussed

above, the Appellants have demonstrated the relevance of the information sought. The Department maintains that a higher burden is imposed under Minn. Rule 1400,6700, subp. 2, than under Minn. Rules of Civil Procedure 26.02(a) for compelling discovery. The Department cites the discussion of discovery in Minnesota Administrative Procedure § 7.5.2, at 144 (Beck, Bakken & Muck, eds. 1987). That discussion states:

> As a practical matter, the only real distinction between the discretionary discovery rule of the OAH [Office of Administrative Hearings] and rule 26.03 is the placement of the burden of showing good cause. Under rule 26.03, the burden is on the party seeking to limit discovery.

> Under the rules of the OAH, the burden is on the party seeking to obtain discretionary discovery. ALJs have traditionally been liberal in granting discovery when the request is not used to oppress the opposing party in cases involving limited issues or amounts.

Id.

The information sought is relevant, the request for discovery is not oppressive, and the delay in requesting the discovery is not significant. The Motion to Compel Discovery is, therefore, GRANTED.

P.A.R.